Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Forbearance of the Verizon	)	
Telephone Companies Pursuant to 47	)	**CC Docket No. 01-338**
U.S.C. § 160(c)	)	

INITIAL COMMENTS OF THE PACE COALITION

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The Promoting Active Competition Everywhere ("PACE") Coalition, (hereinafter the "PACE Coalition," or "Coalition,"), through counsel, hereby submits its initial comments in the above-captioned proceeding.[1] The PACE Coalition is comprised of a diverse group of companies who have committed substantial capital resources to developing the necessary infrastructure to compete in the most difficult of circumstances—that is, entering a market dominated by incumbents whose network and resources have been accumulated over more than a century, much of it protected from competition by government policy. The members of the Coalition have invested millions of dollars of capital and have deployed a diverse base of facilities, operational infrastructure and innovative software applications, and business processes to compete in the local telecommunications market. The common feature among the members of the Coalition is their use of unbundled local switching ("ULS") in the combination known as the Unbundled Network Element Platform ("UNE Platform" or "UNE-P") to establish a broad competitive footprint and provide conventional voice services to mass-market residential and small business customers not yet positioned to benefit from higher capacity digital services.

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[1] *See Verizon Petition for Forbearance*, CC Docket 01-338, DA 02-1884 (rel. Aug. 1, 2002) ("*Verizon Petition*" or "*Petition*").

I. INTRODUCTION

In its *Petition*, Verizon contends that items four through six, and item ten of the Section 271 checklist (local loop, local transport, local switching, and access to databases and associated signaling, i.e. "OS/DA") no longer need be unbundled and made available to competitors under Section 251(d)(2), and asks the Commission to exercise its authority under Section 10(d) of the Act to forebear from the enforcement of those provisions of Section 271 because they have been "fully implemented."[2]

In these comments, the PACE Coalition demonstrates that the Commission has no choice but to reject out of hand Verizon's *Petition* as premature, misguided and intellectually inconsistent. Indeed, Verizon's arguments are contrary to the clear terms of the Telecommunications Act of 1996,[3] its implementation by state and federal authorities and common sense.

The PACE Coalition submits that the threshold argument upon which all of Verizon's other arguments rely—that the elements of the UNE Platform, including loops, switching, transport and OS/DA no longer meet the Section 251(d)(2) test for unbundling—fails under any circumstances. Indeed, an examination of the evidentiary record in the *Triennial Review* proceeding[4] shows that the Section 251(d)(2) standard is met for each element for which Verizon seeks to have the Commission "forbear" from requiring be made available as a UNE.

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2 *Verizon Petition* at 3.

3 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. ("1996 Act").

4 *In the Matter of Review of Section 251 Unbundling Obligations of Local Exchange Carriers*, CC Docket No. 01-339, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, and *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Notice of Proposed Rulemaking*, 15 FCC Rcd 22781 (rel. Dec. 20, 2001) ("*Triennial Review NPRM*" or "*UNE Triennial Review*").

Furthermore, even if Verizon's faulty premise—that loops, switching, transport and OS/DA no longer meet the criteria for unbundling under Section 251(d)(2)—is accepted for the sake of argument, the ludicrous legal conclusions that Verizon reaches certainly do not follow from that presumption. In these comments, the PACE Coalition debunks Verizon's contentions that: (1) failure to meet the Section 251(d)(2) standard for unbundling automatically requires the Commission to exercise its forbearance authority under Section 10; (2) forbearance is in the public interest because unbundling is contrary to Congress's deregulatory approach to promoting "investment and facilities-based competition;"[5] (3) there is an inherent conflict between the unbundling standard of Section 251(d)(2) and Section 271 to the extent that Section 271 would require elements be unbundled that do not meet Section 251(d)(2); and (4) the "fully implemented" language of Section 10(d) of the Act means that, once a BOC has proven that it satisfies the Section 271 checklist, the checklist item must be deemed to be "fully implemented."

II. CONTRARY TO VERIZON'S ASSERTION, NATIONAL APPLICATION OF 251(D)(2) UNEQUIVOCALLY DEMONSTRATES THAT LOOPS, SWITCHING, TRANSPORT AND OS/DA CONTINUE TO MEET THE UNBUNDLING CRITERIA OF SECTION 251(D)(2)

Market experience has repeatedly demonstrated that achieving broad competition for the typical residential and small business customer requires access to a full complement of unbundled network elements, including those comprising the UNE Platform. A UNE-P based local entry strategy has proven successful because it addresses each of the most critical impairments that would otherwise frustrate entrants seeking to offer mass-market services. Verizon's *Petition* is, without question, a reaction to the perceived "threat" of UNE-P and the

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5 *Verizon Petition* at 5.

success of UNE-P in bringing competitive choice to local residential and small business consumers, as envisioned by the Act.[6]

In its *Petition*, Verizon argues that because there is "considerable nationwide competition for switching, dedicated transport, high capacity loops, and signaling," and "there is substantial intra-and inter-modal competition for services using non-high-capacity loops in certain circumstances," the Commission should no longer require that the component elements of the UNE Platform be unbundled.[7]

The PACE Coalition will not restate in these comments the positions articulated by the UNE-P Coalition in the Triennial Review proceeding; however, the PACE Coalition submits that the appropriate Section 251(d)(2) unbundling analysis is the one adopted by the Commission in the *UNE Remand Order*. Accordingly, application of the 'necessary' and 'impair' analysis to each of the UNE Platform elements requires the Commission to continue to require that the constituent elements of the UNE Platform remain unbundled.[8]

As the UNE-P Coalition demonstrated in its comments and reply comments in the *Triennial Review* proceeding, the Commission should reject Verizon's approach to ascertaining

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6 *See UNE-P Fact Report* (August 2002).

7 *Verizon Petition* at 3-5.

8 In the *UNE Remand Order*, the Commission concluded that the ILECs' failure to provide access to a non-proprietary network element "impairs" a requesting carrier within the meaning of Section 251(d)(2)(B) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element *materially diminishes* a requesting carrier's ability to provide the services it seeks to offer. In order to evaluate whether there are alternatives actually available to the requesting carrier as a practical, economic, and operational matter, the Commission stated that it would look at the totality of the circumstances associated with using an alternative, considering cost of the element; timeliness, including the time associated with entering a market as well as the time to expand service to more customers; quality, ubiquity, including whether the alternatives are available ubiquitously; and impact on network operations. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, 15 FCC Rcd 3734-3745, ¶¶ 72-100 *(1999) ("UNE Remand Order") (emphasis added), clarified, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 15 FCC Rcd 9587 (2000).

whether there is adequate "competition" for the elements that comprise UNE-P (which, under Verizon's test, consists of merely citing unverified figures regarding the number of CLEC switches in the top 150 MSAs, and the number of route miles of fiber deployed by CLECs).[9] As the UNE-P Coalition's comments in the *Triennial Review* proceeding indicated, Verizon's methodology, if it can be called that, should be rejected out of hand.

As the UNE-P Coalition, as well as almost every state commission that filed comments in the *Triennial Review* proceeding noted, the proper test of whether an element can be removed from the required list of UNEs requires an examination of discrete geographic conditions, with a focus on whether a requesting carrier's ability to compete will be materially diminished if it is unable to obtain unbundled access to a particular network element. This effectively requires the Commission to determine whether a fully functioning, competitive, *wholesale* market exists for a requested network element. If a wholesale market for a network element has developed sufficiently, carriers should be able to obtain interchangeable network elements from sources other than the ILECs.

While a nascent market for a few UNEs may exist in some isolated geographic areas today, the PACE Coalition submits that a wholesale market must be robust, sustained and, most importantly, ubiquitous, to be taken into account when determining whether the Section 251(d)(2) impairment standard is met. As the record in the *Triennial Review* proceeding reveals, no such market exists for any UNEs today, including the UNE-Platform UNEs, and accordingly, Verizon's bare assertion that there is "considerable nationwide competition" for the UNE-P elements must be rejected, along with its *Petition*.

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[9] *See Verizon Petition* at 3-5, n. 12-18.

III. FORBEARANCE IS NOT JUSTIFIED IN ORDER TO PREVENT "OVERBROAD" UNBUNDLING

Verizon asserts in its *Petition* that "forbearance is in the public interest since overbroad unbundling is antithetical to Congress' intent to establish a deregulatory environment that fosters investment and competition. Unbundling creates profound disincentives for investment by ILECs, CLECs and intermodal competitors alike."[10] Verizon's argument defies common sense.

The 1996 Act embraced a market philosophy that favored *all* entry strategies, with the view that market forces should guide the deployment of investment and the sequence of competitive expansion. As Congress and the courts interpreting the Act have long recognized, opening the local phone markets to competition is an extraordinarily difficult task. The D.C. Circuit recently acknowledged the "extraordinary complexity of the Commission's task" in opening local markets to competition and added that Congress "plainly believed that merely removing affirmative legal obstructions would not do the job."[11]

The Commission noted in the *UNE Remand Order* that the standards and unbundling obligations that it adopted therein were "designed to create incentives for both incumbent and competitive LECs to innovate and invest in technologies and services that will benefit consumers through increased choices of telecommunications services and lower prices."[12] Furthermore, the Commission recognized that "there will be a continuing need for all three of the arrangements

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10 *Verizon Petition* at 5-6 (citations omitted).

11 *United States Telecom Association v. FCC*, , 290 F.3d 415, 421-22 (D.C. Cir. 2002).

12 *UNE Remand Order*, 15 FCC Rcd at 3700, ¶ 5

Congress set forth in Section 251 to remain available to competitors so that they can serve different types of customers in different geographic areas."[13]

The fact remains that six years after the passage of the 1996 Act, Congress' goal of robust local competition is still far from being achieved—and the continued availability of UNEs and UNE combinations, including UNE-P, are essential to meeting that goal at any time in the foreseeable future. As the Commission told the Supreme Court last year, "the UNE Platform has been the most important vehicle for competitive entry into local markets for residential and small business customers."[14] In any event, even assuming *arguendo* that "facilities-based" (as Verizon would define that term) investment should be prioritized, it must be understood that the availability and use of UNEs, including the UNE Platform, does not deter investment in facilities. Indeed, granting Verizon's flawed *Petition* would only serve to decrease, not increase, local telecommunications competition in the United States, and will foreclose any competitive choice for mass-market residential and small business customers for the foreseeable future. Accordingly, whatever its current policy preferences, the Commission may not override the intent of Congress by regulatory fiat, and it is clear that the requirements of Section 10 of the Act for grant of Verizon's *Petition* have not been met, as set forth below.

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13 *Id. Citing Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15509, para. 12 (1996) *(Local Competition Order)*, aff'd in part and vacated in part sub nom., *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (*CompTel v. FCC*) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utils. Bd. v. FCC*), aff'd in part and remanded, *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997), further recons. pending.

14 Brief for Petitioners Federal Communications Commission and the United States, No. 00-511 *et al., Verizon Communications, Inc. v. FCC and related cases* at 44 (April 2001).

IV. THE *VERIZON PETITION* DOES NOT MEET THE FORBEARANCE STANDARDS OF SECTION 10 OF THE ACT

Verizon argues, unconvincingly, and in a desperate attempt to justify its *Petition*, that: (1) forbearance is necessary to avoid creating conflict between Section 251(d)(2) and Section 271, and (2) the "fully implemented" language of Section 10(d) applies once a BOC has proven it has satisfied the Section 271 checklist,[15] and therefore, even if the Commission concludes that Section 271 creates an independent unbundling obligation, the Commission should grant Verizon's forbearance request.

In Section 271, Congress has spoken—at least with respect to the BOCs—as to what the minimally acceptable level of unbundling must be, requiring that loops, transport, switching and OS/DA be provided on an unbundled basis in order to comply with the competitive checklist.[16] Accordingly, the competitive checklist sets forth minimum unbundling obligations that apply to the BOCs. It would be irrational for Congress to have required the BOCs to offer loops, transport, switching, and OS/DA as part of Section 271 compliance, if Congress also intended to allow the Commission to subsequently withdraw those items from the UNE list pursuant to Section 251(d)(2).

Further, the anti-backsliding provisions of Section 271 clearly do not contemplate relieving a BOC of its unbundling obligations once its Section 271 application has been approved. Rather, Section 271(d)(6) of the statute provides for a range of penalties if the "Commission determines that a Bell operating company has ceased to meet any of the conditions

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[15] Section 10(d) of the Act specifically provides that "the Commission may not forbear from applying the requirements of Section 251(c) and 271 under subsection (a) of this section until it determines that those requirements have been fully implemented." Accordingly, Verizon must demonstrate that, besides meeting the forbearance criteria applicable to every other section of the Act, Sections 251(c) and 271 have been "fully implemented." This heightened standard for forbearance was not doubt created because those two sections are the key "market opening provisions" of the Act.

[16] 47 U.S.C. § 271(c)(2)(B).

required for such approval," and authorizes a plethora of remedies, including suspension of interLATA authority and fines. Therefore, contrary to Verizon's assertion, a finding of compliance with the Section 271 checklist is not tantamount to a finding that Section 271 has been "fully implemented" for purposes of Section 10(d).

Verizon's argument for forbearance is also contrary to the clear language and structure of the forbearance provision set forth in Section 10. Specifically, Section 10(a) of the Act requires a showing that a provision: (1) is not necessary to ensure that the charges and practices of carriers "are just and reasonable and not unjustly and unreasonably discriminatory;" (2) is not necessary "for the protection of consumers;" and (3) the Commission can forbear from enforcement of the provision in a way that is otherwise "consistent with the public interest." Section 10(b) additionally requires the Commission, in determining if forbearance meets the "public interest" test of Section 10(a)(3), to consider whether "forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[17] Verizon's *Petition* on its face, fails to meet these criteria.

While the Commission has not yet addressed the application of Section 10(a)'s requirements to the Section 271 checklist, or the meaning of "fully implemented" in Section 10(d), the PACE Coalition agrees with Z-Tel, that in examining the facially deficient *Verizon Petition,* the Commission should be instructed in its forbearance analysis by the Commission's decision in the *AT&T Non-Dominance Order*,[18] which examined carefully the competitive effect upon consumers and carriers of AT&T's exercise of market power, and whether the public

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17 47 U.S.C. § 10(b).

18 *In re Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995)("*AT&T Non-Dominance Order*").

interest would be served. The factor that the Commission considered in *AT&T Non-Dominance Order* that is most relevant to the instant petition is whether enforcement of the dominant carrier regulations is necessary to protect consumers and other carriers and is otherwise in the public interest. This is almost the exact same inquiry mandated by Section 10(a). Importantly, however, Congress, which enacted the 1996 Act shortly after AT&T was declared non-dominant, and thus was likely aware of the Commission's analysis. As a result, Congress required a heightened showing for forbearance with respect to Sections 251(c)(3) and 271, and required the Commission to find that those sections have been "fully implemented." Accordingly, Section 10(d) mandates an even more vigorous showing than that which is minimally necessary to meet Section 10(a)'s "protect consumers and other carriers" requirement.

The PACE Coalition agrees with the comments filed by Z-Tel in the *Triennial Review* proceeding, that the Section 10(d) "fully implemented" language requires the Commission to find that there is *a functioning wholesale market in a geographic area in which competitors may obtain what they need to serve end-users and there is some assurance that the wholesale market will continue to function in the absence of an unbundling requirement.*[19] Then, and only then, can Sections 251(c) and 271 be considered "fully implemented." The existence of a mature wholesale market will not only protect consumers and other competitors, but will also ensure that each mode of entry authorized by Congress in Sections 251(c) and 271 will continue to be viable in the absence of enforcement of that provision.[20] More specifically, these two sections require that competitors have the ability to lease network elements at cost-based rates. Accordingly, there is no doubt that Sections 251(c) and 271 cannot be said to be "fully implemented" until such time as competition has taken root and each mode of entry envisioned by Congress is

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19 *See Reply Comments of Z-Tel Communications, Inc.*, CC Docket 01-338 at 120 (filed July 17, 2002).

20 *Id.* at 121.

available in the absence of regulatory oversight. This conclusion follows from the terms of these provisions, which each emphasize the ability of competitors to lease network elements at cost-based rates.[21] Congress clearly intended to preclude a conclusion that these provisions have been fully implemented until competition has taken root such that the market provides for entry by each mode in the absence of regulatory oversight. That day has not yet come.

As noted above, the nascent (but growing) amount of competition in the local telephony market cannot change the fact that Verizon and its BOC brethren still control the bottleneck facilities necessary to provide service. In fact, the Supreme Court noted this fact, stating that the BOCs "have an almost insurmountable competitive advantage" owing mostly to their control of loops, transport, and switching.[22] The *Verizon* Court also emphasized that Congress provided three modes of competitive entry, and gave "aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property," and noted that duplication of some bottleneck facilities "was neither likely nor desired."[23] Therefore, the market-opening provisions of the Act will not be "fully implemented" in a particular local market until competitors may enter and continue to provide service in any of the three ways provided by Congress without regulatory oversight, and only a functioning wholesale market provides that assurance.

The Commission similarly has described the long-term goal of the 1996 Act as "creating robust competition in telecommunications," which it aptly described as "competition among

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21 Section 251(c)(3) requires ILECs to provide unbundled access to network elements on non-discriminatory terms and in accordance with the requirements of Section 252. The checklist in Section 271 requires BOCs to provide unbundled access to loops, transport, and switching at cost-based rates in accordance with the pricing rules in Section 252(d)(1). 47 U.S.C. § 271(c)(2)(B)(i) and (xiv).

22 *Verizon Communications, Inc. v. FCC*, 122 S.Ct. 1646, 1662 (2002).

23 *Verizon*, 122 S. Ct. at 1661, 1675.

multiple providers of local service that would drive down prices to competitive levels."[24] Competition among multiple facilities-based competitors, as exists in the long distance market and will develop over time in at least some local markets, is likely to lead to the creation of a wholesale market. Such a wholesale market is a prerequisite to achievement of the robust competition that the Commission has properly described as the long-term goal of the Act. But, until that goal is achieved, the market-opening provisions of the Act will not have been "fully implemented."

An interpretation of Section 10(d) requiring the existence of a robust wholesale market also makes sense because competitors entering new markets in the future will continue to need to use resale or to lease network elements to gain a foothold. As the Supreme Court stated, some "expensive facilities" owned by the BOCs are "unlikely to be duplicated,"[25] and certainly not by more than a few competitors. It would not make sense, either from a perspective of a particular company or from the perspective of the public interest, for every competitor to construct a redundant network in every market. If a functioning wholesale market for local service exists, market forces can guide the decisions of new entrants. Until that day arrives, enforcement of the statutory provisions Congress enacted is necessary to foster robust competition, and the Commission must continue to enforce these provisions of the Act, and reject the *Verizon Petition*.

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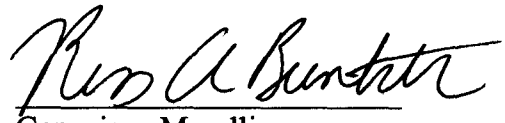
[24] *UNE Remand Order* at 3727 (¶ 55).

[25] *Verizon*, 122 S. Ct. at 1668.

V. CONCLUSION

For the foregoing reasons, the PACE Coalition urges the Commission to reject the *Verizon Petition* as legally deficient.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Courtenay P. Adams, hereby certify that, on the 3rd day of September 2002, a copy of the foregoing *Initial Comments of the PACE Coalition*, was delivered by hand to the following:

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